by serving a garnishment notice on the manager of the Central Electricity Board. The record in this appeal does not show how otherwise he was able to carry out the order for execution. At any rate, the attempt to attach a pension led to the manager of the Central Electricity Board filing an objection, which the learned magistrate dismissed, after hearing the parties.

The objector relied on section 22 of the Electricity Ordinance, 1949, of which the relevant portions read as follows:

22. (1) Subject to the approval of the Yang di-Pertuan Agong, the board shall establish a scheme or schemes for the payment of super-annuation allowances, pensions or gratuities to officers and servants of the board who retire from the service of the board, or otherwise cease to hold office, by reason of age, or of infirmity of body or mind, or of abolition of office.

(2) The following provisions shall apply to any scheme established under this section —

xx xx xx xx

(b) no donation or contribution to a fund established under any such scheme or interest thereon shall be assignable or transferable or liable to be attached, sequestered or levied upon for or in respect of any debt or claim whatsoever other than a debt due to the board or to the Federal Government or a State or Settlement Government.

Mr. Devaser's argument *per contra,* was that a pension was property, and the Central Electricity Board could not raise any objection since they have no interest in such property. He argued further that, once a maintenance order has been made "subsequent default should be treated as a criminal matter, and in such case the Central Electricity Board could not object: even in a civil case they had no standing." He also referred to section 3(1)(c) of the Debtors Ordinance, 1957, section 4 of the Married Women and Children (Maintenance) Ordinance, 1950 and section 283 of the Criminal Procedure Code.

I do not follow Mr. Devaser's arguments at all. Kandasamy's pension is not liable to attachment under section 22 of the Electricity Ordinance, 1949. Whether the proceedings that follow default by the husband in compliance with a maintenance order are criminal or not, is immaterial and beside the point when an application for execution is made, not against the husband, but a third party who pays his pension.

The appeal is allowed and the order of the magistrate is set aside, with costs here and in the court below.

Appeal allowed.

Solicitors: *Shearn, Delamore & Co.; Devaser & Co.*

LIM EOW THOON v. LIM KENG CHUAN & ORS.

[O.C.J. (Hepworth J.) May 7, 1965]

[Penang — Civil Suit No. 48 of 1963]

Trusts and trustees — Express trust — Burial grounds — Compulsory acquisition by Government of part of property subject to trust — Award — Involuntary substitution of money for land — Interests of persons entitled to benefit of property should survive acquisition.

By an indenture dated September 17, 1930 between T.S.S. of the first part, the plaintiff of the second part and L.E.H. and the first and second defendants (hereinafter called the trustees) of the third part, T.S.S. by the direction of the plaintiff conveyed and the plaintiff conveyed and confirmed unto the trustees certain lands in Penang on the trusts and conditions to be made by a separate deed of declaration of trust therein to be declared concerning the same. By the same indenture the trustees jointly and severally convenanted with the plaintiff, his executors and administrators that they would maintain and keep the said lands as a family burial ground. No separate deed of declaration of trust was ever made. L.E.H. died and the third defendant was appointed trustee in his place. A portion of the said lands was acquired by the Government of the State of Penang in 1962 and in subsequent proceedings the money awarded was paid into court.

The plaintiff claimed that as no separate deed of declaration of trust was made as envisaged in the said indenture of 1930 there had been a failure of the trust and that there was accordingly a resulting trust of the said lands in his favour and that the money in court should be paid out to him. The plaintiff also submitted that even if the said indenture was complete in itself there was nonetheless a resulting trust in respect of the money in court representing the award for certain portions because acquisition by the State Government made it no longer possible for the portions to be used as a burial ground and accordingly the trust in so far as the portions were concerned failed.

Held: (1) as there was no uncertainty as to the trust property and as there was no uncertainty as to the beneficiaries or as to the way in which the property was to be applied all the prerequisites for the creation of an express trust were present and the said indenture was a deed creating a trust which was complete in itself and required no separate deed of declaration of trust;

(2) applying the principle in *In re Scholfield's Will's Trusts,*(5) the compulsory acquisition of part of the trust property under the Land Acquisition Act, 1960, was the involuntary substitution of a sum of money for some pieces of land and would not appear to be any ground for effecting any substitution of the persons entitled to the benefit of the property. Fairness of administration would appear to require that as far as possible the interest of the trustees and therefore the interests of the persons entitled to the benefit of the property should survive the acquisition of that property.

Cases referred to:—

(1) *King* v. *Denison,* 35 E.R. 106.

(2) *Re Cooper's Trusts* [1956] 3 All E.R. 28.

(3) *Re West* [1900] 1 Ch. 84.

(4) *Cheang Tew Muew & Ors.* v. *Cheang Cheow Lean Neo & Ors.* [1930] S.S.L.R. 58.

(5) *In re Scholfield's Will's Trusts* [1949] 1 Ch. 345.

CIVIL SUIT.

C. H. Smith and *Ong Huck Lim* for the plaintiff.

C. O. Lim for the 1st, 2nd and 3rd defendants.

Lim Kean Chye for the 4th defendant and the 7th and 8th defendants (personel representatives of the 5th defendant).

The 6th defendant was not represented at the hearing, having by consent been dismissed from the suit.

Cur. Adv. Vult.

Hepworth J.: By his will dated the 30th March, 1900, Lim Leng Cheak left the residue of his estate as to 8/20ths thereof to his widow, Tan Say Seang Neoh (hereinafter referred to as Madam Tan) and as to 3/20ths thereof each to Lim Eow Hong, Lim Eow Thoon (the plaintiff), Lim Eow Hooi and Lim Eow Teng.

The said Lim Leng Cheak died on the 10th February, 1901, and probate of his will was granted on the 25th March, 1901, to Madam Tan, the said Lim Eow Hong, Goh Boon Keng and Lim Phee Cheak, the executors and trustees named therein.

The said Lim Eow Teng died on the 3rd July, 1916, without leaving any lawful issue and his share under the said will fell into residue and thereby the said 20 shares were reduced to 17 shares.

On the 10th February, 1922, under the terms of the said will the estate of the said Lim Leng Cheak, deceased, became distributable.

On the 20th July, 1925, the said Lim Eow Hooi sold his 3/17th share in the residuary estate of the said Lim Leng Cheak, deceased, to the plaintiff with the result that the plaintiff then became entitled to 6/17ths of the said residuary estate.

In 1925 an action was commenced in the High Court at Penang in Suit No. 425 of 1925 by Madam Tan, the plaintiff and the said Lim Eow Hooi against the said Lim Eow Hong. As a result of this action it appeared that the said Lim Eow Hong had wrongly drawn for himself from the estate of the said Lim Leng Cheak, deceased, a sum exceeding the amount to which he was entitled, that accordingly he had no further interest in or claim to the said estate and that he was forthwith discharged as a trustee of the said estate. It was also held in that case that the assignment by the said Lim Eow Hooi to the plaintiff on the 20th July, 1925 of his 3/17th share in the said residuary estate was valid and legal.

Of the five persons to whom the residuary estate of Lim Leng Cheak, deceased, had been given all had then been, if I may use the expression, eliminated, except Madam Tan and the plaintiff. But by an order made on the 21st December, 1927, in the said Suit No. 425 of 1925 it was ordered and declared that the real property of the estate of the said Lim Leng Cheak, deceased, was vested in Madam Tan in her own right absolutely. This order was registered in the Registry of Deeds, Penang, against the properties with which we are here concerned on the 15th February, 1928.

It is not clear why this order was made in these terms but it has remained unchallenged for 36 years and so consideration of the issues arising in this case must be on the basis that at the beginning of 1928 all the real property comprised in the estate of Lim Leng Cheak, deceased, was vested in Madam Tan in her own right absolutely.

By an agreement dated the 25th March, 1929, and made between Madam Tan of the 1st part and the plaintiff of the 2nd part it was agreed that the estate of Lim Leng Cheak, deceased, should be finally wound up and for the consideration therein mentioned Madam Tan agreed to transfer to the plaintiff for his own use absolutely whenever called upon to do so all the landed properties of the said estate in Penang and Kedah whether in her name or in the name of the estate of Lim Leng Cheak, deceased, and whether held by her or any other person as trustee.

Certain land and hereditaments had been used and maintained as a burial ground for the said Lim Leng Cheak, deceased, his family and descendants, including Lots 140(11), 43(1), 43(2), 43(3), 135, 13(1), 13(2), 13(3), 13(4), 139(2), 139(3), 143 and 144(1), all in Mukim XVIII, North East District, Penang, which formed part of the estate of the said Lim Leng Cheak, deceased. It was the intention and wish of Madam Tan and the plaintiff that the said lands and hereditaments should as far as possible be maintained and kept as a burial ground for the family and the descendants of the said Lim Leng Cheak and for such purpose the plaintiff requested the said Lim Eow Hooi, Lim Keng Chuan (the 1st defendant) and Lim Seong Wah (the 2nd defendant) to manage and look after the same and apply the income derived therefrom for the maintenance and upkeep of all graveyards and tombs thereon which they agreed to do.

In order to carry out this arrangement and in part fulfilment and discharge of the terms of the said agreement dated the 25th March, 1929, the plaintiff requested Madam Tan to convey the said land and hereditaments to the said Lim Eow Hooi and the 1st and 2nd defendants as trustees direct instead of to him.

Accordingly by an indenture (hereinafter referred to as the said indenture) dated the 17th September, 1930, and made between Madam Tan of the 1st part, the plaintiff of the 2nd part and the said Lim Eow Hooi and the 1st and 2nd

defendants (thereinafter called "the trustees") of the 3rd part Madam Tan by the direction of the plaintiff and as trustee conveyed and the plaintiff conveyed and confirmed unto the trustees all the lands and hereditaments more particularly described in the schedule thereto, which included the properties specified above, to hold unto the trustees in fee simple to the extent that the same should be held by the trustees on the trusts and conditions to be made by a separate deed of declaration of trust therein to be declared concerning the same.

In addition the trustees thereby jointly and severally covenanted with the plaintiff, his executors and administrators that they would during their lives and the life of the last survivor of them maintain and keep the said land and hereditaments as a burial ground for the use and benefit of the family and descendants of the said Lim Leng Cheak, deceased, and would not sell, mortgage or otherwise dispose of the same, and that they would out of the profits and income to be derived therefrom maintain and keep in good order and repair all graveyards, tablets and tombs then erected or thereafter to be erected on any part thereof.

No separate deed of declaration of trust was ever made.

The said Lim Eow Hooi died and Lim Keng Teong (the 3rd defendant) was appointed a new trustee by a deed of appointment of new trustees dated the 30th December, 1952.

In Land Acquisition Proceedings No. 1 of 1962 *inter alia* Lots 139(3), 139(2), 144(1) and 143, Mukim XVIII, North East District, Penang, being part of the lands and hereditaments comprised in the said indenture were acquired by the Government of the State of Penang and the collector awarded the sum of $147,349.59 as compensation for these four lots. This sum is included in the sum of $183,925.59 paid into court in respect of all the property then acquired, under an order of court dated the 27th September, 1962, made in Originating Summons No. 306 of 1962.

The plaintiff submits that as no separate deed of declaration of trust was ever made as envisaged in the said indenture there has been a failure of the trust and that there is accordingly a resulting trust in respect of the properties comprised in the said indenture in favour of the plaintiff, and that the money in court representing the amount awarded in respect of the acquisition of Lots 139(3), 139(2), 144(1) and 143, Mukim XVIII, North East District, Penang, being part of the lands comprised in the said indenture, should be paid out to the plaintiff.

The plaintiff therefore claims:—

(1) Construction of the said indenture and

(2) A declaration that in the events that have happened there is a resulting trust in favour of the plaintiff, and an order that the money in court representing the amount awarded in respect of Lots 139(3), 139(2), 144(1) and 143, Mukim XVIII, North East District, Penang, being part of the lands comprised in the said indenture, be paid out to the plaintiff.

The defendants deny that there has been any failure of the trusts under the said indenture and submit that that deed is complete in itself and that accordingly, despite the fact that no separate deed of declaration of trust was ever made, there is no resulting trust in favour of the plaintiff either in respect of the property referred to in the said indenture other than the property which has been acquired or in respect of the property which has been acquired.

The defendants counterclaim for a declaration that the trust for a burial ground for the family of Lim Leng Cheak, deceased, in terms of the said indenture subsists.

A number of other matters are alleged in the defence and counterclaim of the 1st, 2nd and 3rd defendants which call in question the recitals in the said indenture to which the 1st and 2nd defendants and the 3rd defendant's predecessor as trustee were parties. The plaintiff pleads, and I agree with him, that they are estopped from so doing. Where, in a deed made between parties and verified by their seals, there is a statement of fact, an estoppel results, and is called "estoppel by deed". If upon the true construction of the deed the statement is that of both or all the parties, the estoppel is binding on each party. (*Halsbury's* Laws of England, 3rd Edn., Vol. 15, page 169). A person is bound by the recitals in a deed to which he is a party whenever they refer to specific facts and are certain, precise, and unambiguous. (*Halsbury's* Laws of England, 3rd Edn., Vol. 15, page 215).

The questions that have to be decided are therefore quite simply whether there has been a failure of the trusts under the said indenture and, if there has not and the said indenture is complete in itself, what is the effect of the compulsory acquisition of part of the property the subject of that trust?

No technical expressions are necessary for the creation of an express trust. It is sufficient if the settler evinces an intention to create a trust and points out with reasonable certainty (a) the trust property, (b) the beneficiaries and (c) the purpose of the trust. (*Underhill's* Law of Trusts and Trustees, 11th Edn., page 19).

It is clearly recited in the said indenture that both Madam Tan and the plaintiff wished the land referred to be maintained and kept as a burial ground and requested the trustees to manage and look after the same and apply the

income derived therefrom in the maintenance and upkeep thereof. This is a clear indication of an intention to create a trust.

The trust property is clearly set out in the schedule to the said indenture.

It is clearly set out in the said indenture that the land is to be maintained and kept as a burial ground for the use and benefit of the family and descendants of the said Lim Leng Cheak, deceased, and the beneficiaries are therefore pointed out with reasonable certainty.

The said indenture states that the purpose of the trust is to maintain and keep the land as a burial ground and out of the profits and income to be derived therefrom (from rubber, coconut and fruit trees) to maintain and keep in good order and repair all graveyards tablets and tombs then erected or thereafter to be erected on any part thereof. The indenture therefore points out with reasonable certainty the purpose of the trust.

The period of the duration of the trust is stated to be during their lives and the life of the last survivor of the trustees. There cannot therefore be said to be any uncertainty as to the period of the duration of the trust.

As there is no uncertainty as to the trust property and as there is no uncertainty as to the beneficiaries or as to the way in which the property is to be applied all the prerequisities for the creation of an express trust are present and I hold that the said indenture is a deed creating a trust which is complete in itself and requires no separate deed of declaration of trust.

The plaintiff however argues that even if the said indenture is complete in itself and does create a trust there is nonetheless a resulting trust in respect of the money in court representing the amount awarded in respect of the acquisition of Lots 139(3), 139(2), 144(1) and 143. The defendants submit that the plaintiff has not pleaded this, as he has pleaded that the money in court is payable to him for the reason that there is a resulting trust in respect of all the property comprised in the said indenture, which includes the money in court representing the lots acquired, because there is a failure of the trust by virtue of there being no separate deed of declaration of trust. He has not pleaded, they say, that there is a resulting trust in respect of the acquisition money even if the said indenture is complete in itself and does create a trust.

I do not agree with the defendants' submission on this point. The plaintiff has pleaded that there is a resulting trust in respect of the money in court in favour of the plaintiff and the fact that he has pleaded a wrong reason for this being so will not preclude him from succeeding on this point if as a matter of law on the facts as they have been pleaded there is a resulting trust in favour of the plaintiff in respect of this money.

The plaintiff says that as the land comprised in Lots 139(3), 139(2), 144(1) and 143 has been acquired it is no longer possible for this land to be used as a burial ground and accordingly the trust in so far as this land is concerned fails with the result that the money in court representing these lots goes to the plaintiff upon a resulting trust.

The plaintiff says that there is a resulting trust in favour of himself because it is clear from the said indenture that it was not intended that the beneficial interest in the property should pass to the trustees. All that was given to the trustees was the right to use the land as a burial ground and for that purpose to use the profits and income arising from that land for a definite period which was the lives of the trustees and the life of the last survivor of them. In support of this submission the plaintiff cites the case of *King* v. *Denison.*[1] In that case a distinction was drawn between devises charged with payment of debts and devises on trust to pay debts. In the former case it is assumed that the testator intended a beneficial interest for the devisee, subject to the payment of debts. In the latter case it is assumed that he intended merely to use the devisee as a vehicle for payment of the debts, and not to confer any benefit upon him. In the latter case there will therefore be a resulting trust of any surplus for the residuary devisee, or those entitled on intestacy, but there will be no resulting trust in the former case. The plaintiff states that the said indenture makes it clear that the intention was merely to use the trustees as a vehicle for the maintenance of the land as a burial ground and not to confer any benefit upon them. Accordingly in the present circumstances there is a resulting trust in favour of the plaintiff.

In further support of this argument the plaintiff cites *Re Cooper's Trusts* [2] and *Re West.*[3] However, I do not think that either of these cases are of assistance. *Re Cooper's Trusts* was a case of a failure of the purpose of a charitable trust and *Re West* was a case of a gift by will for a particular purpose only, when, on completion of the performance of that particular purpose, there was a surplus remaining which was not required for that purpose. In both those cases the purpose of the trust had ceased to exist. That is not so in the present case.

The defendants say that the trusts in so far as this land is concerned do not fail but the acquisition money becomes part of the trust property, and is available to the trustees for the purposes of the trust.

There does not seem to be any contest between the parties that this is not a case for

the application of a *cy-pres* scheme because such a scheme is only granted where there is a general charitable intention disclosed in the instrument. (*Cheang Tew Muew & Ors.* v. *Cheang Cheow Lean Neo & Ors.*[4]).

In the present case it seems to me that the trust is still complete and all that has happened is that there has been the involuntary substitution of a sum of money for some pieces of land.

I have not been referred to any authority in which the facts bear any similarity to the facts of the present case. However, some assistance can, I think, be obtained from cases arising out of war damage legislation in England where sums of money, so to speak, involuntarily took the place of land.

In *In re Scholfield's Will's Trusts, Scholfield* v. *Scholfield & Ors.*[5] certain freehold and leasehold properties had been held by trustees upon the trusts of a will. These properties had suffered war damage and value payments in respect of the damage both to the freeholds and leaseholds were made to the trustees by the war damage commission under the War Damage Act, 1943.

It was conceded by all parties in that case that the value payments which had been received from the war damage commission in respect of the testator's freehold properties should be treated wholly as capital and retained and invested by the trustees accordingly, the freehold properties presumably remaining vested in the trustees.

The result of the war damage to the leasehold properties, however, was that the leaseholds had disappeared, not by expiry but by war damage followed by disclaimer under the War Damage Act, 1943. In their stead, however, were sums of money, the value payments made in respect of the damage. In reaching a decision as to how these sums of money should be treated Romer J. stated the general principle as follows:—

"The fact that money has, through wholly fortuitous circumstances, been substituted for an interest in property affords, in my judgment, no ground for effecting, in addition, a substitution of beneficial interests. Fairness of administration would appear to require that, so far as possible, the rights of the beneficiaries should survive the destruction of the property from which they derived the income which the testator gave them."

In those circumstances his Lordship decided that so far as possible the sums of money should be treated in the same way as the leasehold properties from which they were derived.

That case is not, of course, exactly on all fours with the present case but in the present case money has through wholly fortuitous circumstances been substituted for an interest in property. Applying the principle enunciated in *Scholfield's case* the compulsory acquisition of part of the trust property under the Land Acquisition Act, 1960, would not appear to be any ground for effecting any substitution of the persons entitled to the benefit of that property. In the present case fairness of administration would appear to require that as far as possible the interest of the trustees and therefore the interests of the persons entitled to the benefit of that property should survive the acquisition of that property.

Accordingly I hold that the sum paid into court as compensation for the compulsory acquisition of Lots 139(3), 139(2), 144(1) and 143 does not go to the plaintiff upon a resulting trust.

The plaintiff's claim is therefore dismissed with costs. There will be judgment for the 1st, 2nd and 3rd defendants on their counterclaim in the terms of prayer 1 thereof with costs and no order in respect of prayer 2, 3, 4, 5 and 6 thereof, and there will be judgment for the 4th, 7th and 8th defendants on their counterclaim in the terms of prayer (i) thereof and in respect of prayer (ii) thereof there will be an order for the payment of the sum of $147,349.59 to the 1st, 2nd and 3rd defendants as trustees of the said indenture, with costs.

Claim dismissed.

Solicitors: *Ong Huck Lim & Co.; Lim, Lim & Oon; Lim Cheng Ean & Co.*

CHANAN SINGH v. THIYAGALETCHUMI

[A.C.J. (Ong J.) May 10, 1965]

[K.L. — Civil Appeal No. 15 of 1964]

Landlord and Tenant — Joint ownership of land — One co-owner giving notice to quit to tenant — Validity of notice — Subseguent sub-division of land — Tenant's acceptance of fresh tenancy — Owner of one lot entering into tenancy over portion of land over which he has no disposing power — Whether trespasser of that portion of land — Control of Rent Ordinance, 1956.

The appellant was the occupying tenant since 1951 of a hut built on a portion of land in the town of Kajang. The owner one Ngo Jin hold an undivided half share of the said land to the respondent in 1958. Subsequently Ngo Jin and the respondent agreed to subdivide the land into two lots and two separate titles were issued to them in their respective names. The respondent then filed her action against the appellant in the sessions court claiming repossession of that portion of the respondent's land occupied by the appellant. The difficulty arose because it was found that the boundary line separating the respondents land from Ngo Jin's land ran through the middle of the appellant's hut. The president of the sessions court gave judgment in favour of the respondent. On appeal,

Held: (1) the appellant by agreement with Ngo Jin had accepted the determination by Ngo Jin of his tenancy which was granted by her before 1958 which tenancy was binding on the respondent when she acquired her half-interest in the land;

(2) the appellant accepted in its place a fresh monthly tenancy from Ngo Jin not only of a portion of the land belonging to herself but also over a portion of